Supreme Court, U.S.
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No. 01 501

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

PETER ASSENATO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (A) Is the refusal of Illinois courts to allow petitioner any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against petitioner, a violation of the substantive and procedural Due Process provisions of the Fourteenth Amendment?

(B) Was Due Process violated when the State trial and reviewing courts denied petitioner a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable?

(C) Does this violate Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing?

PARTIES INVOLVED

Petitioner, Peter Assenato, was the defendant-petitioner in the Circuit Court of Cook County, Illinois; the Appellant in the Appellate Court of Illinois; and the Petitioner in the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the plaintiff-respondent in the Circuit Court of Cook County; the Appellee in the Appellate Court of Illinois; and the Respondent in the Illinois Supreme Court.

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Certiorari should be allowed, because the State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing.

The refusal of Illinois courts to allow defendant any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against defendant, violates defendant's rights to substantive and procedural Due Process per the Fourteenth Amendment.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Peter Assenato (hereafter, "defendant"), prays that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review its judgment affirming the summary dismissal of defendant's petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence relative to defendant's previous conviction and sentence for murder.

Opinions and Orders Below

1. The [unreported] judgment ("Order") of the Illinois Appellate Court, First Judicial District, No. 1-99-2910, dated March 16, 2001, affirming the summary dismissal of defendant's petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence, is set out at App. A, pp. App. 1-11, in the Separate Volume Appendix.

2. The [unreported] Order of the Illinois Appellate Court, First Judicial District, No. 1-99-2910, dated May 2, 2001, denying petition for rehearing, is set out at App. B, p. App. 12, in the Separate Volume Appendix.

3. The [unreported] Order of the Illinois Supreme Court, No. 91613, dated June 29, 2001, denying petition for leave to appeal, is set out at App. C, p. App. 13, in the Separate Volume Appendix.

4. Other relevant Opinions and Orders entered in the case (Supreme Court Rule 14.1(i)(ii)), are also set out in the Separate Volume Appendix as:

APPENDIX D (pp. App. 14-25): Opinion of the Appellate Court of Illinois, First Judicial District, No. 1-89-2941, December 23, 1991, affirming defendant's conviction for murder, published at 224 Ill.App.3d 96, 586 N.E.2d 445, 166 Ill.Dec. 487 (1 Dist. 1991).

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APPENDIX F (p. App. 27): [unreported] Order of the Illinois Supreme Court, No. 73111, March 27, 1992, denying petition for leave to appeal.

APPENDIX G (p. App. 28): [unreported] Order of the Circuit Court of Cook County, No. 88 CR 2648, July 6, 1994, dismissing defendant's post-conviction petition.

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APPENDIX J (pp. App. 36-53): [unreported] Memorandum Opinion and Order, United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 2843, September 28, 1998, denying petition for writ of habeas corpus.

APPENDIX K (pp. App. 54-56): [unreported] Order of the United States District Court, Northern District of Illinois, Eastern Division, No. 97 C 2843, November 12, 1998, denying certificate of appealability.

APPENDIX L (pp. App. 57-58): [unreported] Order of the United States Court of Appeals for the Seventh Circuit, No. 98-3991, March 17, 1999, denying request for certificate of appealability.

5. The judgment sought to be reviewed is different from the date of the Order required in sub-subparagraph (i) (Supreme Court Rule 14.1(i)(iv).

[unreported] Order of the Circuit Court of Cook County, No. 88 CR 2648, July 27, 1999, dismissing defendant's petition for judgment of acquittal or new trial pursuant to 735 ILCS 5/2-1401, and actual innocence pursuant to 725 ILCS 5/116-3, as a post-conviction petition, thus it is set out at App, M, p. App. 59, of the Separate Volume Appendix.

Jurisdictional Statement

The judgment sought to be reviewed was entered by the Illinois Appellate Court on March 16, 2001. (App. A, p. App. 1) Rehearing was denied on May 2, 2001. (App. B, p. App. 12)

The Order of the Illinois Supreme Court denying petition for leave to appeal was entered on June 29, 2001. (App. C, p. App. 13)

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

Constitutional Provision Involved

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Statement of Facts

On June 9, 1999, defendant filed a petition for judgment of acquittal or a new trial based on newly-discovered evidence and actual innocence. (App. A, p. App. 3)

Defendant asserted that the sole witness to offer any direct evidence against defendant, at defendant's jury trial for murder, admitted under oath to a retired Chicago police officer, now a private investigator, in the presence of a notary public, that he fabricated his trial testimony. (App. A, p. App. 3; C 13-16) Defendant attached the affidavit of the witness to the petition. (App. A, p. App. 3)

The witness, a drug user, died after admitting under oath that he fabricated his trial testimony, but before defendant filed his petition. (App. A, p. App. 3; see App. D, pp. App. 21, 23-24.)

Illinois statutory law allows for the admissibility of prior statements when a witness is deceased upon a showing of trustworthiness, and other circumstances. 735 ILCS 5/110-4, et seq.

Regardless, the trial court summarily dismissed defendant's petition

without allowing any hearing thereupon. (App. A, p. App. 3)

The Illinois Appellate Court affirmed because "recantations are often deemed highly unreliable." (App. A, p. App. 6)

The Illinois Supreme Court summarily denied review. (App. C, p. App. 13)

Defendant is respectfully seeking a writ of certiorari, with directions that Illinois allow a hearing on his claims of newly-discovered evidence and actual innocence.

Raising the Federal Question

A. In the court of first instance the federal question sought to be reviewed was raised at paragraph 3 of defendant's petition for judgment of acquittal or new trial based on newly discovered evidence and actual innocence, and throughout, passim.

B. In the Illinois Appellate Court, First Judicial District, the federal question sought to be reviewed was raised at page 3 of Appellant's Brief, and throughout, passim.

C. In the Illinois Supreme Court, the federal question sought to be reviewed was raised, throughout, passim, and at page 5 of defendant's petition for leave to appeal, with defendant "wondering how his actual innocence is somehow less significant than the actual innocence of the many other wrongfully convicted Illinois prisoners released after hearings on their claims?"

See also App. O, pp. App. 61-62.

REASONS FOR GRANTING CERTIORARI

Certiorari should be allowed, because the State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing.

The refusal of Illinois courts to allow defendant any hearing on his claims of newly-discovered evidence and actual innocence, including a recantation from the sole witness who provided any direct evidence against defendant, violates defendant's rights to substantive and procedural Due Process per the Fourteenth Amendment.

The State trial and reviewing courts denied defendant a hearing to prove the reliability of evidence that proves his actual innocence -- the recantation of the State's "star" witness -- on the premise that recantation testimony is unreliable.

(App A, p. App. 6)[1]

This violates Due Process as per the rule of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973), that the reliability of a witness's extrajudicial statements must be tested by an evidentiary hearing (even if that hearing is outside the presence of the jury).

This is an action from an Illinois prisoner asserting his actual innocence. Illinois courts are denying him any opportunity to have a hearing held on his claims of actual innocence.

Here, as shown below, there are specific violations of Due Process, overriding any purported state law rationalization for denying relief.[2]

This Court has held that Due Process requires the states to provide an avenue to process prisoners' claims of actual innocence. Herrera v. Collins,

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[1] The Illinois Appellate Court affirmed because "recantations are often deemed highly unreliable." (App. A, p. App. 6)

[2] Due Process prevails over state procedure. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973); Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347 (1974). See p. 12, infra.

506 U.S. 390, 122 L.Ed.2d 203, 227 (1993).

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 90 L.Ed.2d 636, 645 (1986), quoting from California v. Trombetta, 467 U.S. 479, 485, 81 L.Ed.2d 413 (1984). Every defendant charged with crime in the State courts has a federally protected constitutional right to present evidence in support of his defense. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967). Indeed:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, supra at 302, 35 L.Ed.2d at 312.

The refusal and failure to allow defendant the opportunity to be heard in court, is a discrete violation of Due Process here. Herrera v. Collins, supra.

Credibility determinations are not made for the first time in the appellate courts. Rogers v. Richmond, 365 U.S. 534, 5 L.Ed.2d 760, 769 (1961); accord, Morrison v. Mitchell, 96 Ill.App.2d 332, 239 N.E.2d 289, 290 (3 Dist. 1968).

Due Process prevails over state procedure. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 312 (1973) (Due Process renders confession of third party admissible to exonerate defendant, despite state law bar). Accord, see Davis v. Alaska, 415 U.S. 308, 39 L.Ed. 2d 347 (1974) (Due Process requires allowing defendant to cross-examine "star" prosecution witness re juvenile record, despite state law sealing juvenile records).

The Illinois courts, in violation of Due Process as per Chambers, supra -- that **reliable evidence that proves actual innocence should be admitted**, even if such admission may violate a state procedure -- and in violation of this Court's holding in Rogers v. Richmond, supra -- that **credibility determinations are to be made by trial courts, not reviewing courts** -- refused to hold a hearing, to enable defendant an **opportunity** to demonstrate the **reliability** of the recantation of the major State witness, a witness so major that without him, there could not be a conviction.[3]

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[3] As in Chambers, where preventing defendant from contradicting the main State witness with prior contradictory statements, violated Due Process; so too here, preventing defendant from contradicting Losasso with Losasso's later statements, violates Due Process.

The State Appellate Court's position that Losasso's testimony was not the only evidence against defendant (App. A, pp. App. 7-8), misses the point. The other evidence is, in part, corroborative; but without Losasso's testimony, no conviction can be had.

The State Appellate Court's action, in justifying the denial of relief on a ground not asserted by the trial court (App. A, pp. App. 3-4) -- delay -- (App. A, pp. 4-5), violates Due Process, because it denies the defendant the right to respond to the assertions of the Appellate Court as to why the trial court did not need to hold a hearing to evaluate the credibility of the recantation. The essence of Due Process is notice and the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 873 (1950); Davis v. Lane, 814 F.2d 397 (7 Cir. 1987).

Here, Due Process was denied when defendant was prevented from proving the credibility of the recantation -- i.e., proving that the evidence should have been admitted pursuant to Chambers.

Defendant respectfully prays for the opportunity to be heard in court; for a hearing.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

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Of Counsel

Dated: September __, 2001

Supreme Court, U.S.

SEP 21 2001

No. 01 501

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

PETER ASSENATO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

SEPARATE VOLUME APPENDIX
PURSUANT TO SUPREME COURT RULE 14.1.(i)
RELATIVE TO:
PETITION FOR WRIT OF CERTIORARI

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APPENDIX B: Order of the Illinois Appellate Court, First Judicial District, No. 1-99-2910, May 2, 2001, denying petition for rehearing...App. 12

3. The Order entered in conjunction with the judgment sought to be reviewed (Supreme Court Rule 14.1(i)(i)) -

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4. Other relevant Opinions and Orders entered in the case by courts (Supreme Court Rule 14.1(i)(ii)) -

APPENDIX D: Opinion of the Appellate Court of Illinois, First Judicial District, No. 1-89-2941, December 23, 1991, affirming defendant's conviction for murder, published at 224 Ill.App.3d 96, 586 N.E.2d 445, 166 Ill.Dec. 487 (1 Dist. 1991).....App. 14

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5. The judgment sought to be reviewed if the date of its entry is different from the date of the Order required in sub-subparagraph (i) (Supreme Court Rule 14.1(i)(iv) -

APPENDIX M: Order of the Circuit Court of Cook County, No. 88 CR 2648, July 27, 1999, dismissing defendant's petition for judgment of acquittal or new trial pursuant to 735 ILCS 5/2-1401, and actual innocence pursuant to 725 ILCS 5/116-3, as a post-conviction petition.....App. 59

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APPENDIX A

SIXTH DIVISION
March 16, 2001

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-99-2910

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 88 CR 2648
PETER ASSENATO,,	)	Honorable Henry R. Simmons, Jr., Judge Presiding.
Defendant-Appellant.	)	

O R D E R

Defendant, Peter Assenato, appeals from an order of the trial court summarily dismissing his petition for judgment of acquittal or new trial based on newly discovered evidence. For the

following reasons, we affirm.

The facts here presented at trial are fully set forth in this court's opinion disposing of defendant's direct appeal and will be recounted here only to the extent necessary. Defendant's conviction arose from the fatal stabbing of Debra Duchetta in December 1987. Following a jury trial, defendant Peter Assenato was convicted of first degree murder and sentenced to 40 years' [p. 2] imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. People v. Assenato, 224 Ill. App. 3d 96, 586 N.E.2d 445 (1991). [App. D, infra] On September 25, 1992, defendant subsequently filed a petition seeking post-conviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (1992)), which the trial court dismissed without an evidentiary hearing. This court affirmed the trial court's dismissal of defendant's petition for post-conviction relief. People v. Assenato, No. 1-94-2459 (November 20, 1995) (unpublished order under Supreme Court Rule 23). [App. H, infra] Following the denial of leave to appeal to the Illinois Supreme Court [App. I, infra], defendant filed a petition for writ of habeas corpus on April 23, 1997. The State filed its reply on July 23, 1997, and defendant filed his reply on January 6, 1998. The district court denied the petition on September 28, 1998. U.S. ex rel. Assenato v. Nelson, No. 97 C 2843

(September 28, 1998). [App. J, infra]

On June 9, 1999, defendant filed a petition for judgment of acquittal or a new trial based on newly discovered evidence and actual innocence. Defendant's petition alleged that under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1998)), section 116-3 of the Criminal Code (725 ILCS 5/116-3 (West 1998)), and section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 1998)), he was entitled to acquittal or a new trial based upon the false trial testimony of the State's witness, James Losasso. Defendant asserted that Losasso was questioned [p. 3] under oath on July 27, 1997, and stated that he fabricated his trial testimony. Defendant attached the affidavit of Losasso to his petition. Losasso died after giving the recantation on July 27, 1997, but before defendant filed his petition on June 9, 1999. Defendant has not offered any explanation for the delay in filing the petition.

Following review of defendant's petition, the trial court dismissed the petition as being without merit and frivolous. We must note that the trial court did not state its reasoning for dismissing defendant's petition. Nevertheless, we may affirm the trial court's decision for any reason warranted by the record regardless of the reason relied upon by the trial

court. People v. Pickens, 275 Ill. App. 3d 108. 114, 655 N.E.2d 1206 (1995). Defendant now appeals.

Defendant contends that the trial court erred in applying the 90-day dismissal provisions of the Post-Conviction Hearing Act (Act) to defendant's petition for acquittal of judgment **[sic.; should be, judgment of acquittal]** or for new trial based upon newly discovered evidence. Defendant argues that the trial court disregarded his request for section 2-1401 relief and mischaracterized it as a petition for post-conviction relief only. The State responds that the trial court properly dismissed defendant's petition as untimely.

We review the dismissal of defendant's petition de novo (People v. Ivy, 313 Ill. App. 3d 1011, 1014 (2000)) and first address defendant's petition as it applies to the Act. Section **[p. 4]** 122-1(c) of the Act bars the filing of a post-conviction petition beyond three years after the date of the conviction or six months after denial for [sic,. should be, of] leave to appeal, whichever is sooner, unless defendant alleges facts showing the delay was not due to his own culpable negligence. 725 ILCS 5/122-1(c) (West 1998). A defendant who claims the untimeliness of his post-conviction petition was not due to his own culpable negligence must make a "substantial

showing" this is the case by alleging facts to support such a claim. People v. McClain, 292 Ill. App. 3d 185, 188, 684 N.E.2d 1062 (1997).

The defendant's petition seeking relief under the Act is a successive petition. The Act contemplates the filing of only one petition. People v. Flores, 153 Ill. 2d 264, 275, 606 N.E.2d 1078 (1992). A second petition is permitted only where the proceedings on the initial petition were deficient in some fundamental way. Flores, 153 Ill. 2d at 275. In response to the State's argument on this point, defendant argues that the proceedings on the initial petition were deficient because that petition was dismissed without a hearing. This court found that the trial court proceeded properly in doing so.

A review of defendant's petition reveals that he has failed to provide any facts alleging that he was not culpably negligent in bringing the petition before the court more than 10 years after his conviction. While defendant offered the affidavit of Losasso, who recanted his trial testimony, defendant failed to show that he [p. 5] diligently pursued Losasso regarding his willingness to recant or that he could not have obtained Losasso's recantations several years earlier.

Defendant's petition also asserts a free-standing post-conviction claim of actual innocence. Our supreme court has recognized the viability of a "free-standing" post-conviction claim of "actual innocence" based on new evidence of actual innocence. See People v. Washington, 171 Ill. 2d 475, 665 N.E.2d 1330 (1996). To be entitled to relief, the supporting evidence must be new, material, noncumulative and of such conclusive character as would probably change the result on retrial. Washington, 171 Ill. 2d at 489. Newly discovered evidence must be evidence which was not available at defendant's trial and which defendant could not have discovered sooner through diligence. People v. Burrows, 172 Ill. 2d 169, 665 N.E.2d 1319 (1996).

Here, defendant's petition does not state a reason as to why Losasso was not interviewed sooner. The Federal district court reviewed Losasso's recantation and found that "with minimal diligence, such additional information was previously available." U.S. ex rel. Assenato v. Nelson, No 97 2843 at 12-13. [App. J, infra] Furthermore, we hold that Losasso's recantation is not of such a convincing character that it would have changed the outcome of defendant's trial. As recantations are often deemed highly unreliable (Burrows, 172 Ill. 2d at 188), and Losasso is now deceased, we hold that it is insufficient to support defendant's

[p. 6] free-standing claim of actual innocence.

We note that neither defendant's direct appeal, initial post-conviction petition or petition for writ of habeas corpus provided sufficient grounds for reversal of defendant's conviction. While defendant urges us to accept his assertion that Losasso's trial testimony was the only evidence presented against him, the record indicates otherwise. A cab driver testified that he picked up defendant and the victim from Losasso's house two days before the victim's body was found. The cab driver further testified that defendant and the victim had quarreled in the cab, and that upon exiting the cab, defendant pulled the victim out. Losasso testified that approximately three hours after defendant and that victim left together, defendant returned to his home alone and told him that [sic.; apparently, the word "he" is erroneously omitted] had "poked" the victim several times. This testimony was supported by the autopsy findings of numerous stab wounds. A phone log introduced into evidence established that on the date and time Losasso indicated in his testimony, defendant called his mother and his girlfriend from Losasso's home. Furthermore, approximately six weeks after the murder, defendant was arrested for driving without a license. Following his arrest, defendant attempted to conceal his identity by

using a fictitious name, but eventually admitted that he was under investigation for murder.

Defendant's petition alternatively argued that he is entitled to relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1998)). Similar to [p. 7] section 122-1(c) of the Post-Conviction Act, where a defendant seeks section 2-1401 relief and the petition is filed beyond two years after the judgment was entered, it cannot be considered. People v. Caballero, 179 Ill. 2d 205, 210, 688 N.E.2d 658 (1997). "The two-year limitation mandated by section 2-1401 and its predecessor, section 72 (Ill. Rev. Stat. 1975 ch. 110, par. 72) must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." Caballero, 179 Ill. 2d at 211.

Defendant's petition for acquittal of judgment [sic.; should be, judgment of acquittal] or new trial based on newly discovered evidence was filed approximately 10 years after the judgment of conviction was entered. Defendant has not asserted any grounds for tolling the limitations period. As such, section 2-1401 is not available as a remedy.

As to defendant's position based

upon section 116-3, we hold that this section is inapplicable to defendant's case. Section 116-3 states as follows:

> "(a) A defendant may make a motion *** for the performance or [sic.; statute reads, "of"] fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial. *** [p. 8]
>
> (b) the defendant must present a prima facie case that:
>
> (1) identity was the issue in the trial which resulted in his or her conviction; and
>
> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
>
> (c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

> (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence;
>
> (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 1998).

A thorough review of defendant's petition reveals that he has erred in his analysis of the applicability of section 116-3 to his case. Defendant states: "[d]efendant petitions for judgment of **[p. 9]** acquittal or a new trial also, based on actual innocence. 725 ILCS 5/116-3, effective January 1, 1998, recognizes a statutory basis to petition for a new trial based on actual innocence, and contains no limitations period therein." Defendant's assertion ignores the fact that section 116-3 codifies the use of forensic testing to support a claim of actual innocence. Defendant has not requested forensic testing, nor has he raised any basis for forensic testing to be conducted. The legislature intended to limit the scope of section 116-3 to situations where the scientific testing being used had the potential to exonerate a defendant. People v. Savory, 309 Ill. App. 3d 408,

414, 722 N.E.2d 220 (1999). Consequently, defendant's request for acquittal of judgment of **[sic.; should be, judgment of acquittal or]** new trial based on newly discovered evidence under section 116-3 must fail.

For the aforementioned reasons, we affirm the trial court's dismissal of defendant's petition in accordance with Supreme Court Rule 23(b).

Affirmed.

QUINN, P.J., with GREIMAN, J., and THEIS, J., concurring.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-99-2910
PETER ASSENATO,	)	
Defendant-Appellant.	)	

O R D E R

This cause coming to be heard on the Petition for Rehearing of the Defendant-Appellant and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

[signed] Patrick J. Quinn
Justice
A. J. Greiman
Justice
M. J. Theis
Justice

ORDER ENTERED
MAY 02 2001
DATED: APPELLATE COURT, FIRST DISTRICT

APPENDIX C

SUPREME COURT OF ILLINOIS
91613 **CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 29, 2001

Mr. Dennis Doherty
Attorney at Law
601 South LaSalle St., Suite 700
Chicago, IL 60605

No. 91613 - People State of Illinois, respondent, v. Peter Assenato, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 23, 2001.

APPENDIX D

224 Ill.App.3d 96
586 N.E.2d 445
[166 Ill.Dec. 487[*]]

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Peter ASSENATO, Defendant-Appellant.

No. 1-89-2941

Appellate Court of Illinois,
First District, First Division

Dec. 23, 1991.

Rehearing Denied Jan. 8, 1992
[App. E, infra]

[586 N.E.2d at 446, 166 Ill.Dec. at 488]

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[*] The Opinion here, App. D, is typed from the West Reporter, Illinois Decisions version, as the Slip Opinion is unavailable; from this computer-typed reproduction (without indication via ellipses), we have omitted the following matters, that do not appear in the Slip Opinion: West Reporter's opening summary; West "key" number paragraphs that precede the text of the Opinion; listing of parties' attorneys; "key" numbers where they appear in the text.

Justice O'CONNOR delivered the opinion of the court:

A jury convicted defendant, Peter Assenato, of murder (Ill.Rev.Stat. 1987, ch. 38, par. 9-1), and the circuit court sentenced him to a 40 year term of imprisonment. He appeals, presenting as issues whether the State proved him guilty of murder beyond a reasonable doubt and whether prejudicial statements made by the prosecutor and certain testimony elicited at trial operated to deny him a fair trial. For the following reasons, we affirm.

The evidence adduced at trial revealed that on December 3, 1987, the body of the victim, Debra Duchetta (Duchetta), was discovered in a puddle of water and blood in a vacant lot near 400 North Racine.

Robert Dieringer, a police evidence technician, investigated the crime scene. Due to the weather conditions, Dieringer was unable to lift any fingerprints from the area. However, Dieringer found a footprint in the mud near the body. The print's total length was approximately 10½ inches and consisted of a small heel and pointed toe.

Dr. Tae An performed the autopsy. Duchetta sustained nine stab wounds and numerous defensive wounds on her hands. Three of the stab wounds were to the

neck, two of which lacerated the jugular vein. According to Dr. An, Duchetta died within minutes of receiving these wounds.

The State's principal witness was James LoSasso. He and his wife had known Duchetta for three years. On November 28, 1987, Duchetta called Losasso and asked if she could spend a few nights at his house because she and her mother had argued. She later arrived at Losasso's home at 26133 West Superior accompanied by defendant. Losasso had known defendant for five to six weeks before this time. Duchetta and defendant remained at the Losasso home until December 1, 1987. At 8 p.m., Duchetta asked Losasso to call a taxi for her since she had decided to return to her parents' home. The taxi arrived between 8:30 and 8:45 p.m. at which time Duchetta left. Defendant followed her.

Shortly after midnight, defendant returned to Losasso's home and told Losasso that he and Duchetta had argued and that he "had to kill her." Defendant said he "poked" Duchetta, but did not think that she "[got] the message." However, he thought Duchetta had gotten the "idea" after he "poked" her a second and a third time. Defendant pointed to the sleeve of his jacket and told Losasso that Duchetta had gotten blood on him. Defendant wore a dark colored jacket and muddy cowboy boots at the time.

After recounting the details of the slaying, defendant asked Losasso to call him a taxi. Defendant then asked to use the phone himself. According to Losasso, defendant took the phone into the washroom and made several calls. After finishing his calls, defendant repeated his story to Losasso and told him that he hoped Duchetta was dead.

During this time, the taxi company called Losasso to inform him that no taxis were available. Defendant called his mother and asked her to pick him up. Defendant also phoned his girl friend. A car arrived for defendant between 1:30 and 1:45 a.m.

On December 2, 1987, Losasso called Albert Vena, a mutual friend of both Duchetta and Losasso, and informed him of what defendant had told him the previous night. Losasso testified that he did not contact police because he was afraid of defendant. Losasso admitted that he initially lied to police regarding defendant's involvement in Duchetta's murder by telling officers that [**586 N.E.2d at 447, 166 Ill.Dec. at 489**] defendant had told him that he had argued with Duchetta in a bar and bloodied her nose. Losasso swore that he told police this because he wanted "to steer police in the right direction" without actually telling them what defendant had said to him. Losasso only told police the truth after Albert Vena told him to do so.

Soltan Ravanmehr, a driver for the Flash Cab Company, arrived at 2613 West Superior at 8:45 p.m. According to his dispatcher, he was to take his fare to Harlem Avenue and Higgins Road. After his arrival at the house, Duchetta and defendant entered his cab. Duchetta appeared to be drunk. She instructed Ravanmehr to go to Harlem Avenue and Higgins Road. After driving one block, defendant told Ravanmehr to turn right. While he was driving, Ravanmehr heard defendant and Duchetta quarreling. Defendant directed Ravenmehr [sic.] to the 2600 block of Grand Avenue. When they reached the middle of the block, defendant told Ravanmehr to stop in front of a house. Ravanmehr heard Duchetta tell defendant, "okay, you go in and I stay here." However, defendant told Duchetta, "let's go" and pulled her out of the cab by her arm. Defendant took Duchetta into the house and returned to the cab to pay the fare.

Anthony Delulio testified that he has lived in Las Vegas since 1974. During the summer and fall of 1987, he was in Chicago seeking employment and stayed at his uncle's home at Grand and Racine. He knew Duchetta from the neighborhood and dated her several times.

On November 28, 1987, Delulio drove Duchetta to her sister's beauty shop on Grand Avenue. Delulio never saw Duchetta again, but did receive several

telephone calls from her over the next few days. On November 29, Duchetta phoned him from Covello's Bar and Grill at 4 p.m. and told him she was staying at Losasso's home, but was planning to go home. The following day, Duchetta phoned him again from Covello's. Delulio told her that if she did not return home, he no longer wanted anything to do with her. On December 1, 1987, a bartender from Covello's called Delulio at a friend's home and informed him that Duchetta was going to meet him at Covello's. Delulio arrived at Covello's around 9 p.m., but Duchetta never arrived. At 11 p.m., Delulio drove to Harlem and North to visit a friend. The friend was not home so Delulio drove back to his uncle's home, arriving at 11:45 p.m.

Delulio returned to Las Vegas the next day. At 7 p.m., he received a phone call from Albert Vena. After his conversation with Vena, Delulio called Duchetta's mother and told her to call the police. On December 3, Duchetta's sister called Delulio and told him that Duchetta had been murdered. Albert Vena also called Delulio on December 5 and informed him that Duchetta's body had been found.

Chicago Police Detective Patrick Harrington investigated Duchetta's murder. On December 3, 1987, he visited defendant's home on Taylor Street, but defendant was not there. On December 5,

Harrington interviewed Albert Vena. During the interview, Vena called Losasso, and Harrington later questioned him. After an arrest warrant was issued for defendant, Harrington made several attempts to apprehend defendant, but could not locate him.

On January 24, 1988, Lyons Police Officer Thomas Schaffer arrested defendant for driving without a license. At the station, defendant identified himself as "Michael Lyndon" and produced a motor club card bearing that name. A computer check revealed that no such name existed. When asked again for his name, defendant continued to give false names. Schaffer finally told defendant that he would be fingerprinted if he did not give his real name. Defendant eventually told Schaffer his name and informed him that he was under investigation for murder in Chicago. Schaffer put defendant's name into the computer and learned that an outstanding warrant existed for his arrest.

Lida Molaro testified on defendant's behalf. On December 1, 1987, at approximately 9 p.m., defendant and Duchetta arrived at her home at 2648 West Grand. Duchetta appeared to be intoxicated. She **[586 N.E.2d at 448, 166 Ill.Dec. at 490]** attempted to make several phone calls, but could not dial the phone correctly. Duchetta had dropped a plastic bag containing clothing on her way into the house, and

Molaro's young daughter picked it up. As a result, Duchetta cursed at the child, and Molaro subsequently told defendant that Duchetta had to leave. Defendant wanted Duchetta to stay until Molaro's husband arrived so that he could give them a ride home. Molaro, however, insisted that Duchetta leave. Duchetta remained at Molaro's house for approximately one hour and was attempting to contact "Red" at Covello's because she was supposed to meet him there. Duchetta ultimately left the house alone. Molaro's husband arrived 20 minutes later and gave defendant a ride home.

On cross-examination, Molaro stated that she did not want either Duchetta or defendant in her house because both appeared to be inebriated.

I.

Defendant maintains that the State failed to prove him guilty beyond a reasonable doubt because no evidence was presented to corroborate defendant's extrajudicial confession to Losasso and because Losasso, as a former drug user, was an incredible witness.

A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. (People v. Collins (1985), 106 Ill.2d 237, 261, 87 Ill.Dec.

910, 478 N.E.2d 267; People v. Vriner (1978), 74 Ill.2d 329, 24 Ill.Dec. 530, 385 N.E.2d 671.) Upon review, the appellate court's function is not to retry the defendant, but to ascertain whether, after viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

The occurrence of an injury or loss, and its causation by criminal conduct are termed the corpus delicti. (People v. Furby (1990), 138 Ill.2d 434, 150 Ill.Dec. 534, 563 N.E.2d 421.) Generally, courts have required that the proof of the corpus delicti may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement since such statements are regarded as untrustworthy. (People v. Furby (1990), 138 Ill.2d 434, 150 Ill.Dec. 534, 563 N.E.2d 421.) Accordingly, the prosecution must present evidence independent of defendant's confession that tends to show the commission of the offense and that corroborates the circumstances related in the statement. (People v. Lambert (1984), 104 Ill.2d 375, 378-79, 84 Ill.Dec. 467, 472 N.E.2d 427.) This corroborative evidence, however, need not establish beyond a reasonable doubt that an offense did occur. People v. Furby, 138 Ill.2d 434, 150 Ill.Dec. 534,

563 N.E.2d 421.

At bar, defendant's statement to Losasso was adequately supported by the evidence. The autopsy findings of numerous stab wounds corroborated defendant's statement to Losasso in that defendant had remarked that he had "poked" Duchetta several times. Furthermore, defendant told Losasso that he and Duchetta had gotten into an argument. Soltan Ravanmehr testified that Duchetta and defendant were quarreling in his taxi. Finally, Losasso testified that defendant, after stating that he had killed Duchetta, made several phone calls from his home to his mother and to his girlfriend. A phone log introduced into evidence revealed that, on the date and time in question, defendant's mother's residence was called from Losasso's house as was defendant's girlfriend's home.

Moreover, evidence of flight is admissible as a fact from which the jury may infer consciousness of guilt. (People v. Miscichowski (1986), 143 Ill.App.3d 646, 656, 97 Ill.Dec. 653, 493 N.E.2d 135.) Defendant, here, fled the area and was not apprehended until two months after the murder. Once arrested in Lyons, defendant attempted to conceal his identity by using several fictitious names because he did not want "to face [Chicago] detectives."

Finally, defendant's attack on

Losasso's credibility also is meritless. A key [586 N.E.2d at 449, 166 Ill.Dec. at 491] witness' testimony is not rendered incredible by prior drug usage. (People v. Titone (1986), 115 Ill.2d 413, 105 Ill.Dec. 923, 505 N.E.2d 300.) The jury here was aware of Losasso's past yet still found him credible. Matters affecting the credibility of witnesses and the weight to be accorded the evidence are within the province of the jury, and this court cannot substitute its judgment for that of the trier of fact. People v. Bradford (1985), 106 Ill.2d 492, 502, 88 Ill.Dec. 615, 478 N.E.2d 1341.

The evidence recited above, when taken as a whole in the light most favorable to the State, supports defendant's guilt beyond a reasonable doubt.

II.

Defendant argues that he was denied a fair trial because the State was permitted to question Duchetta's stepfather regarding his children and Losasso regarding his credibility. Defendant also maintains that various comments made during the State's opening and closing arguments were prejudicial.

A review of the record reveals that defendant has waived all of these arguments because he either failed to object at trial or failed to raise the

issues in his post-trial motion. See People v. Enoch (1988), 122 Ill.2d 176, 119 Ill.Dec. 265, 522 N.E.2d 1124.

Based on the foregoing, defendant's conviction is affirmed.

Affirmed.

CAMPBELL and BUCKLEY, JJ., concur.

APPENDIX E

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	No. 1-89-2941
PETER ASSENATO, Defendant-Appellant.	)	

O R D E R

This cause coming to be heard on the Petition for Rehearing of the Defendant-Appellant and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

[signed] J. O'Connor
Justice
C. Campbell
Justice
R. Buckley
Justice

ORDER ENTERED
JANUARY 8, 1992
DATED: APPELLATE COURT, FIRST DISTRICT

APPENDIX F

SUPREME COURT OF ILLINOIS
73111 **CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

March 27, 1992

Mr. Allan A. Ackerman
Law Offices of Allan A. Ackerman
2000 N. Clifton
Chicago, Illinois 60614

No. 73111 - People State of Illinois, respondent, v. Peter Assenato, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 21, 1992.

APPENDIX G

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	INDICTMENT NO. 88 CR 2648
vs.	
PETER ASSENATO	INDICTMENT FOR: POST-CONVICTION

CERTIFIED REPORT OF DISPOSITION

The following disposition was rendered before the Honorable Judge JOHN W. CRILLY ON JULY 6, 1994. DEFENDANT NOT PRESENT. CASE ADVANCED. ORDER OF COURT POST-CONVICTION DENIED.

[SEAL OF CIRCUIT
COURT OF COOK COUNTY,
ILLINOIS]

I hereby certify that
the foregoing has been
entered of record on
the above captioned case.

Date: SEPTEMBER 19, 1994

[signed] _____
AURELIA PUCINSKI,
CLERK OF THE CIRCUIT COURT

APPENDIX H

First Division
November 20, 1995

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-94-2459

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 88 CR 2648
PETER ASSENATO,,	)	Honorable John W. Crilly,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant Peter Assenato (Assenato) appeals the order dismissing his post-conviction petition without an evidentiary hearing. He seeks a new trial or, in the alternative, a hearing

on his petition.

We are unable to grant Assenato the relief he seeks. The petition was properly dismissed.

On August 3, 1989, Assenato was found guilty of the December 1, 1987, stabbing death of Debra Duchetta. He appealed his conviction and this court affirmed, finding that sufficient evidence of his guilt had been presented at trial. People v. [p. 2] Assenato (1991), 224 Ill. App. 3d 96, 586 N.E.2d 445. [App. D, supra]

In his direct appeal, Assenato was represented by counsel other than his trial counsel. In fact, he was represented on appeal by the same counsel who now represents him in these post-conviction proceedings.

In his direct appeal, counsel did not raise the issue of ineffective assistance of trial counsel. Instead, he raises the issue for the first time in the post-conviction petition.

On the petition, Assenato's counsel contends that trial counsel was incompetent or deficient because (1) he did not adequately investigate the case, interview witnesses, or prepare for trial, (2) he did not present to the trial court an allegation of jury tampering which had been brought to his attention before the close of the trial,

and (3) he had a conflict of interest.

A defendant who can show that his Federal and State constitutional rights were substantially violated at trial, may obtain relief under the Post-Conviction Hearing Act. (725 ILCS 5/122-1 through 122-7 (West 1992).) A petition brought under the Act is a collateral attack on the final judgment. (People v. Owens (1989), 129 Ill. 2d 303, 307, 544 N.E.2d 276; People v. Free (1988), 122 Ill. 2d 367, 522 N.E.2d 1184.) It is not the function of the proceeding to relitigate guilt or innocence, but to determine whether defendant's constitutional rights were denied. (People v. Thompkins (1994), 161 Ill. 2d 148, 157, 641 [p. 3] N.E.2d 371.) The scope of post-conviction review is limited to constitutional matters which have not been, and could not have been, previously adjudicated. Thompkins, 161 Ill. 2d at 157, quoting People v. Winsett (1992), 153 Ill. 2d 335, 346, 606 N.E.2d 1186.

A defendant is not entitled to a hearing on a post-conviction petition as a matter of right. (People v. Titone (1992), 151 Ill. 2d 19, 24, 600 N.E.2d 1160.) An evidentiary hearing is only required when defendant has made "a substantial showing that his constitutional rights were violated and the record or accompanying affidavits support the allegations in the petition." (People v.Smith (1994), 268

Ill. App. 3d 574, 577, 645 N.E.2d 313.) A trial court's decision to summarily dismiss a petition will not be reversed unless the trial court abused its discretion. People v. Dean (1992), 226 Ill. App. 3d 465, 589 N.E.2d 888.

In the present case, the affidavits submitted in conjunction with the petition are conclusory and fail to establish a basis for granting an evidentiary hearing. In Peter Assenato's affidavit he claims that his attorney did not effectively represent him because his mother and brother, Joseph, were not called as witnesses. But in Joseph's affidavit, Joseph admits that Peter's trial attorney interviewed him, his mother and brother, as well as other family members. Since trial counsel interviewed these potential witnesses, under the Strickland [p. 4] standard, we must defer to counsel's decision not to present their testimony. Thompkins, 161 Ill. 2d at 163.

There are several reasons why we must reject the claim that trial counsel was ineffective because he failed to present the allegation of jury tampering. First of all, it is clear from the record that trial counsel was aware of the allegations, made by Assenato's family, that certain members of the jury had in their possession a copy of Assenato's "rapsheet." It is also clear that trial counsel had his investigator look into the allegations

after trial by contacting several jurors. Thus, we must assume that counsel was unable to obtain any evidence to substantiate the claim of jury tampering and his decision not to present the claim to the trial court was a reasoned one.

In addition, counsel does not present any additional evidence at this time, other than the affidavits of Assenato's family members, to substantiate the claim of jury tampering. Defendant's additional investigation of the matter produced nothing.

The third basis for claiming ineffective assistance of counsel is a claim of conflict of interest. This claim, however, is unsupported by any evidence.

Defendant's brother, Joseph, states in an affidavit that, in November 1992, he was contacted by a person who had been peripherally involved in the case, Albert Vena. Vena told Joseph that "his attorney," Eddie Genson, could help Peter get out of [p. 5] jail and urged Joseph to contact him. Genson is a partner in the same law firm which represented Assenato at trial. A motion filed by Genson in Vena's case indicates that he was retained to represent Vena in a 1993 attempt murder case.

These facts hardly establish

conflict of interest since Assenato's trial ended in August 1989.

For the reasons stated above, we find that the trial court did not abuse its discretion. We affirm the order summarily dismissing defendant's post-conviction petition without an evidentiary hearing.

AFFIRMED.

WOLFSON, J., with CAMPBELL, P.J. and BUCKLEY, J., concurrring [sic.]

APPENDIX I

80314

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

April 3, 1996

Mr. Allan A. Ackerman
Law Offices of Allan R. [sic.] Ackerman
2000 N. Clifton
Chicago, Il 60614

No. 80314 - People State of Illinois, respondent, v. Peter Assenato, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[September 28, 1998]

UNITED STATES OF AMERICA ex rel. Peter ASSENATO,	)	
Petitioner,	)	
v.	)	No. 97 C 2843
	)	Judge George M.
Keith D. NELSON,	)	Marovich
Respondent.	)	

MEMORANDUM OPINION AND ORDER

After a jury convicted Peter Assenato of first degree murder, the Illinois circuit court sentenced him tc 40 years in prison. Assenato now seeks to overturn that conviction by petitioning this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Specifically, Assenato claims that: (1) he did not receive a fair trial as a result of prosecutorial misconduct; and (2) his trial counsel was ineffective as a result of a conflict of interest. For the following reasons, Assenato's petition is denied.

BACKGROUND

In reviewing a habeas petition, this Court presumes that the factual findings of the state courts are correct, unless the petitioner refutes that presumption by clear and convincing [p. 2] evidence. 28 U.S.C. § 2254(e)(1); see also Lindh v. Murphy, 96 F.3d 856, 867 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S.Ct. 2059 (1997) (holding that the new provisions enacted by the Antiterrorism and Effective Death Penalty Act of 1996 do not apply retroactively to non-capital habeas petitions filed before the effective date of the Act). Since no challenge has been tendered, this Court adopts the facts as set forth in People v. Assenato, 224 Ill. App. 3d 96, 97-101, 586 N.E.2d 445, 446-48 (1st Dist. 1991). [App. D, supra]

From November 28, 1987 until December 1, 1987, the victim, Debra Duchetta ("Duchetta"), and the petitioner, Peter Assenato ("Assenato"), stayed at James Losasso's ("Losasso") home. On December 1, 1987, Duchetta decided to return to her parent's home, so she asked Losasso to call her a cab. The cab arrived between 8:30 and 8:45 p.m., at which time Duchetta left. Assenato followed her. Consistent with the dispatcher's instructions, Duchetta requested that she be taken to the corner of Harlem Avenue and Higgins Road, but after driving one block,

Assenato changed the destination and directed the cab driver to the 2600 block of Grand Avenue. Assenato and Duchetta quarreled during this ride. They arrived at Lida Molaro's ("Molaro") house at approximately 9:00 p.m. Although Duchetta wanted to stay in [p. 3] the cab, Assenato said "let's go" and then pulled her out of the cab by her arm. After Molaro told Assenato that Duchetta had to leave, Duchetta left the house alone at about 10:00 p.m. Twenty minutes later, Molaro's husband arrived and gave Assenato a ride home.

Shortly after midnight, Assenato returned to Losasso's home and told Losasso that he and Duchetta had argued and that he "had to kill her." I "poked" Duchetta, Assenato told Losasso, but since she did not "[get] the message," I "poked" her a second and third time. Assenato then showed Losasso his jacket sleeve and said that Duchetta had gotten blood on him. That night, and on the night he was arrested, Assenato wore cowboy boots. After recounting the details of the slaying, Assenato took Losasso's phone into the washroom and made several phone calls. Once he had completed his calls, Assenato then repeated his story to Losasso, adding that he hoped Duchetta was dead. Sometime between 1:30 and 1:45 a.m., a car pulled up and Assenato left.

On December 2, 1987, Losasso told a friend, Albert Vena ("Vena"), what

Assenato had told him the previous night. When questioned by police, Losasso initially lied. He told the police that Assenato had told him that he had argued with Duchetta in a bar and bloodied her nose. At trial, Losasso testified that he [p. 4] did not initially contact the police because he was afraid of Assenato; and he had lied in an effort "to steer [the] police in the right direction" without actually telling them what Assenato had told him on December 1, 1987.

On December 3, 1987, Duchetta's body was discovered in a vacant lot near 400 North Racine in a puddle of water and blood. Due to the weather conditions, the police were unable to identify any fingerprints from the area. But, the police did discover a footprint near the body. The length of this footprint was approximately 10 ½ inches, and it consisted of a small heel and a pointed toe. The autopsy revealed that Duchetta had sustained numerous stab wounds. Three of these wounds were to her neck, two of which lacerated her jugular vein. The police attempted to question Assenato on December 3, 1987, but he was not at home.

On December 5, 1897, the police interviewed Vena. During this interview, Vena called Losasso. Vena and Losasso spoke in private and then Losasso told the police what Assenato had told him on December 1, 1987.

Shortly thereafter, an arrest warrant was issued for Assenato; and although the police made several attempts to apprehend him, Assenato could not be found.

On January 24, 1988, the Lyons Police arrested Assenato for driving without a license. Assenato initially identified himself [p. 5] as "Michael Lyndon" and produced a motor club card bearing that name. But a computer check revealed hat no such name existed. Assenato continued to give the police false names until Officer Schaffer told Assenato that he would be fingerprinted if he refused to give his real name. Assenato then identified himself and told the Lyons Police that he was under investigation in Chicago for murder.

On October 13, 1989, Assenato was convicted of the first degree murder of Duchetta and sentenced to a 40-year term at the Dixon Correctional Center in Dixon, Illinois. Assenato retained new counsel and appealed his conviction to the Illinois Appellate Court, alleging that: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) prosecutorial misconduct during the testimony and summation denied him a fair trial. The Appellate Court considered Assenato's arguments and affirmed the trial court's conviction. Assenato, 224 Ill. App. 3d at 102, 586 N.E.2d at 449. [App. D, supra] The court found that Assenato had waived his

prosecutorial misconduct claim since he either failed to object at trial or failed to renew the objection in his post-trial motion. Id. Assenato's PLA was subsequently denied on March 27, 1992. [App. F, supra]

Assenato then collaterally attacked his conviction in state [p. 6] court, arguing, inter alia, that a conflict of interest rendered his trial counsel ineffective. More specifically, Assenato argued that his trial counsel failed to call Vena as a witness, despite the fact that Vena spoke with Losasso, the State's principal witness, just before Losasso informed the police of Assenato's December 1, 1987 confession. In support of Assenato's assertion that, during his trial, Vena was also his trial counsel's client, Assenato proffered a November 1992 affidavit from his brother and a 1993 motion indicating that a member of his trial attorney's law firm filed in an unrelated case. Although his issue could have been raised by Assenato's new counsel on direct appeal, the Appellate Court, nevertheless, addressed the merits of the claim. The affidavit and motion only indicated that Assenato's trial attorney represented Vena in 1993. Thus, the court held that "[t]his claim . . . is unsupported by any evidence," and the trial court's dismissal of Assenato's post-conviction petition without an evidentiary hearing was affirmed. Assenato, No. 94-2459, slip

op. at 4. [App. H, supra]

Assenato next sought leave to appeal to the Illinois Supreme Court. In his PLA, Assenato reasserted the same ineffective assistance of counsel claims that had failed in the lower courts. The Illinois Supreme Court denied this petition on April 3, 1996. [App. I, supra] [p. 7]

On April 23, 1997, Assenato filed a pro se Petition for a Writ of Habeas Corpus. In his Petition, Assenato asserts two grounds for collateral relief: (1) prosecutorial misconduct; and (2) ineffective assistance of counsel due to the above-mentioned conflict of interest. The State submitted a timely answer on July 23, 1997. Thereafter, Assenato retained new counsel and filed his reply on January 6, 1998.

DISCUSSION

Before considering the merits of Assenato's Petition, this Court must first determine whether federal review is barred because Assenato failed either to exhaust his state remedies, see 28 U.S.C. § 2254(b)(1)(A), or his conviction rests on an independent and adequate state procedural ground. See Coleman v. Thompson, 501 U.S. 722, 729-32 (1991); see also Steward v. Gilmore, 80 F.3d 1205, 1211 (7th Cir. 1996) ("Federal habeas relief is available

only when a petitioner has given the state courts a full and fair opportunity to review a claim, when there is cause and prejudice for the failure to raise the claim in the state court or when the default would lead to a 'fundamental miscarriage of justice.'"). The State concedes that Assenato has exhausted his state court remedies, thus the State has waived this requirement. See 28 U.S.C. § 2254(b)(3). [p. 8]

I. Prosecutorial Misconduct

The State argues that Assenato is procedurally barred from raising his prosecutorial misconduct claim because he failed to properly present that claim to the state courts. Forfeiture of a claim under § 2254 "is a question of a state's internal law: failure to present a claim at the time and in the way required by the state is an independent state ground of decision, barring review in a federal court." Hogan v. McBride, 74 F.3d 144, 146 (7th Cir. 1996). In other words, if the state in which the habeas petitioner was convicted would treat a certain procedural violation as a default barring further review, then that default similarly bars federal review of the claim. See Caley v. Dottily, 71 F.3d 691, 694 (7th Cir. 1995).

In his Petition, Assenato asserts that his "trial was tainted by several instances of prosecutorial misconduct."

However, the Illinois Supreme Court has held that in order to preserve an issue for review, both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial. See People v. Enoch, 122 Ill.2d 176, 186, 522 N.E.2d 1124, 1129 (1988). Accordingly, the Appellate Court found that Assenato had either failed to object at trial or failed to renew his objection [p. 9] in his post-trial motion. Assenato, 224 Ill. App. 3d at 102. Consequently, this Court will not address the merits of Assenato's prosecutorial misconduct claim, unless Assenato can show both cause and prejudice.[1] See McCleskey v. Zant, 499 U.S. 478, 488 (1986)).

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[1] Assenato does not argue "fundamental miscarriage of justice" here, nor would this Court grant him relief from the default on that ground. That exception is limited to those rare cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. In light of the evidence presented to the court during Assenato's trial, this exception is clearly inappropriate. Consequently, Assenato may only raise his prosecutorial misconduct claim on collateral review if he can show both cause for, and prejudice resulting from, his failure to preserve the claim for direct appeal.

Assenato contends that "it would be inappropriate to charge petitioner responsible for any waiver on the part of the lawyer established to have been operating under an actual conflict of interest." In effect, Assenato argues that the constitutionally ineffective assistance of his trial counsel is "cause" for his failure to comply with Illinois' procedural requirements. See [p. 10] Murray, 477 U.S. at 488. This Court's review of the record, however, reveals that Assenato has failed to mention this argument in his § 2254 petition. And no motion to amend has been requested, nor would one be granted. Instead, Assenato's undeveloped "cause argument" first appears in his reply to the State's answer. Because a reply brief is not the proper pleading to raise additional issues or defenses, see Jackson v. Duckworth, 112 F.3d 878, 880 (7th Cir.), cert. denied, 118 S.Ct. 380 (1997), this Court finds that Assenato has not advanced a cognizable "cause argument." Moreover, before Assenato can argue in federal court that counsel's ineffectiveness constituted "cause," he must have given the state courts the opportunity to consider that ineffectiveness claim. See Murray, 477 U.S. at 489; see also Montgomery v. Meloy, 90 F.3d 1200, 1204-1205 (7th Cir[.] 1996) (petitioner waived his ineffectiveness claim because he failed to raise it in his first post-conviction proceeding). Thus, a petitioner who

fails to argue in state court that the ineffectiveness of his trial counsel caused a procedural default creates a second procedural default for which the petitioner must also satisfy the cause and prejudice standard. Since it is clear that Assenato has failed to show, or even allege, cause in state court for the procedural default of his prosecutorial misconduct [p. 11] claim, federal review of that claim is not available.

II. Ineffective Assistance of Counsel

A. Evidentiary Hearing

Assenato argues that the Illinois post-conviction courts should not have decided the merits of his ineffective assistance claim without first conducting an evidentiary hearing. But, this Court's review of the record, again, reveals that Assenato has failed to raise this issue in his § 2254 petition. See Jackson, 112 F.3d at 880 (7th Cir. 1997) (additional issues may not be raised in the reply). Nevertheless, even considering the merits of Assenato's reply, his request for an evidentiary hearing must also be denied.

Relying on Townsend v. Sain, 372 U.S. 293, 312 (1963) and Spreitzer v. Peters, 114 F.3d 1435, 1456 (7th Cir. 1997), Assenato claims that this Court should apply a two-step test to

determine whether he is entitled to an evidentiary hearing. However, with the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), that test is no longer controlling for habeas petitions filed after April 24, 1996. Instead, 28 U.S.C. § 2254(e)(2) controls. Accordingly, since Assenato's habeas petition was filed on April 23, 1997, this Court may not grant an evidentiary hearing with respect to any claim that [p. 12] Assenato could have developed in state court unless he demonstrates that the claim relies on: (1) a new rule of constitutional law that the Supreme Court has made retroactive to cases of collateral review, 28 U.S.C. § 2254(e)(2)(A)(i), or (2) a factual predicate not previously discoverable through the exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A)(ii). Assenato must also show that the underlying claim "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).[2] Assenato offers in support of the § 2254(e)(2)(A) requirement; thus, this Court has no

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[2] Unlike 28 U.S.C. § 2244(b)(2)(B)(ii), 28 U.S.C. § 2254(e)(2)(B) applies to both clauses (i) and (ii) of subparagraph (A); otherwise, the two provisions are virtually identical.

need to address the actual innocence language of subparagraph (B), although that too remains unsatisfied.[3] Assenato's request for [p. 13] an evidentiary hearing is denied.

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[3] In addition to the evidence offered in support of his Illinois post-conviction proceedings, Assenato now offers additional evidentiary exhibits which accompany his reply to the State's answer. His reply includes a 1997 affidavit from Losasso, several 1974-6 court records concerning the law firm of Genion & Adam, and several 1988 court records concerning the law firm of Stillo & DeMeo. Although expanding the record to include additional relevant materials is subject to this Court's discretion, and Assenato has failed to request that the record be [p. 13] expanded, this Court exercises such discretion sua sponte. See Rules Governing § 2254 Cases, Rule 7(a); see Bryan v. Duckworth, 88 F.3d 431, 432 (7th Cir. 1996) (court ordered record expanded by addition of affidavit from potential witness). Unfortunately for Assenato, however, these evidentiary exhibits not only show that, with minimal diligence, such additional information was previously available, but also that Assenato's trial counsel, Terry Gillespie, was not a member of any law firm that represented Vena in 1974-6 or in 1988.

B. The Merits

The State concedes, and this Court agrees, that Assenato's ineffective assistance of counsel claim was adjudicated in the state courts on the merits. Therefore, 28 U.S.C. § 2254(d), as amended by AEDPA, governs the disposition of this claim. Accordingly, Assenato's ineffectiveness claim is not entitled to a writ of habeas corpus unless the state adjudication of the claim resulted in a decision that was: (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1), or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254 (d)(2).

Under the AEDPA, Congress has limited the source from which this Court may rely when addressing a habeas petition. "Federal [p. 14] courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case law." Bocian v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996). Thus, under the familiar two-pronged approach of Strickland, Assenato must demonstrate: (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that there exists "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984).

The extent to which Assenato must demonstrate prejudice, however, depends on whether the existence of the conflict was brought to the trial court's attention. When a timely objection is made to a conflict of interest and the court fails to adequately investigate, a reviewing court will presume prejudice, even if no actual conflict is shown. See Holloway v. Arkansas, 435 U.S. 475, 484-91 (1978) (since defense counsel objected to the conflict of interest at trial, and the trial court failed to adequately consider the objection, the Court reversed the state convictions without considering whether there was an actual conflict of interest). If, on the other hand, the trial court has not been sufficiently advised of the alleged conflict, then a [p. 15] reviewing court may not presume prejudice unless the petitioner demonstrates that "counsel actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Strickland, 466 U.S. at 692.

Assenato contends that his trial counsel labored under a conflict of interest in that a member of his trial

counsel's law firm represented Vena, a friend of the State's principal witness who had been only peripherally involved in the case. Since this alleged conflict was not brought to the trial court's attention, prejudice will not be presumed unless Assenato can demonstrate that his trial counsel not only actively represented conflicting interests, but that an actual conflict adversely affected his attorney's performance. Id.

In support of Assenato's assertion that, during his trial, Vena was also his trial counsel's client, Assenato submits a November 1992 affidavit from his brother, a 1993 motion indicating that a member of his trial attorney's law firm was involved in an unrelated case, a 1997 affidavit from Losasso, 1974-76 court records concerning the law firm of Genson & Adam, and 1988 court records concerning the law firm of Stillo & DeMeo. Such evidence, however, fails to demonstrate any conflict of [p. 16] interest, let alone that prejudice resulted thereby. The 1992 affidavit and the 1993 motion merely demonstrate that Assenato's trial counsel's firm represented Vena no less than two years after the conclusion of Assenato's trial. The 1997 affidavit and the 1974-76 court records indicate that Ed Genson, and not Assenato's trial attorney, represented Vena prior to Assenato's trial. And, the 1988 court records show that an entirely different law firm represented Vena during

Assenato's trial, thus contradicting the 1997 affidavit representing that Vena "has always used Ed Genson as his lawyer."

The animating principle underlying the new limitation on a federal court's ability to provide habeas corpus relief is that "the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions." Lindh, 96 F.3d at 871. The trial court permitted Assenato to supplement his original petition for post-conviction relief; and this Court has also permitted the expansion of Assenato's record. Thus, Assenato has had more than a sufficient opportunity to obtain affidavits and documentation to support his arguments. Notwithstanding such an opportunity, however, Assenato has demonstrated neither prejudice nor objective incompetence in his trial counsel's performance. In light of the [p. 17] foregoing, it can hardly be contended that the state court's adjudication of this claim either runs counter to case law established by the Supreme Court or involves the unreasonable determination of the facts in light of the evidence presented. Accordingly, Assenato's ineffective assistance of counsel claim must also fail.

CONCLUSION

For the reasons set forth above, this Court denies Assenato's petition for a writ of habeas corpus.

ENTER:

[signed] _____
GEORGE M. MAROVICH
UNITED STATES
DISTRICT JUDGE

DATED: Sept. 28, 1998

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[November 12, 1998]

UNITED STATES OF AMERICA ex rel. Peter ASSENATO,	)	
Petitioner,	)	
v.	)	No. 97 C 2843
	)	Judge George M. Marovich
Keith D. NELSON,	)	
Respondent.	)	

DENIAL OF CERTIFICATE OF APPEALABILITY

Petitioner Peter Assenato ("Assenato") has filed a Notice of Appeal to appeal this Court's September 28, 1998 denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Federal Rule of Civil Procedure 22(b) provides that an applicant for writ may not proceed unless the district court issues a certificate of appealability or states the reasons why such certificate should not issue. A district court may issue a certificate of appealability only if the "applicant has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2).

In order for this Court to issue a certificate of [p. 2] appealability, there must be a showing that "'the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). Assenato's notice of appeal, however, does not identify the issues he plans to raise in connection with his appeal of this Court's Order. As recognized by the Seventh Circuit, "it is hard to satisfy the requirements of the new § 1153(c)" where the petitioner does not "provide reasons why a certificate of appealability is in order." Circuit Rule 22.1 Comment; see also Griffin v. Endicott, 937 F. Supp. 832, 833 (W.D. Wis. 1996).

In his habeas petition, Assenato raised two arguments. Specifically, he argued that: (1) he did not receive a fair trial as a result of prosecutorial misconduct; and (2) his trial counsel was ineffective as a result of a conflict of interest. Assenato failed to raise his claims of prosecutorial misconduct during his trial or in his post-trial motions and this Court found that he had not demonstrated "cause and

prejudice" to excuse his failure to raise these issues. Thus, this Court held that Assenato was procedurally barred from raising his [p. 3] prosecutorial misconduct claims. As for Assenato's ineffective assistance argument, this Court found that Assenato had failed to establish that his counsel had a conflict of interest or that any alleged conflict of interest adversely affected the outcome of his trial. Accordingly, this Court concludes hat Assenato has failed to make a "substantial showing of the denial of a constitutional right" as required by § 2253(c)(2).

Therefore, the Court denies Assenato's request for a certificate of appealability.

ENTER:

[signed] _____
GEORGE M. MAROVICH
UNITED STATES
DISTRICT JUDGE

DATED: Nov. 12, 1998

APPENDIX L

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 15, 1999
Decided March 17, 1999

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

PETER ASSENATO, Petitioner- Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98-3991 v.	97 C 2843
THOMAS P. ROTH, Respondent- Appellee.	George M. Marovich, Judge.

O R D E R

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final

order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**. All other motions are denied as moot.

APPENDIX M

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	INDICTMENT NO. 88 CR 2648
vs.	)	
PETER ASSENATO	)	INDICTMENT FOR:

CERTIFIED REPORT OF DISPOSITION

The following disposition was rendered before the Honorable Judge Henry R. Simmons, Jr., dismissed your post conviction petition.

[SEAL OF CIRCUIT
COURT OF COOK COUNTY,
ILLINOIS]

I hereby certify that
the foregoing has been
entered of record on
the above captioned case.

Date: July 27, 1999

[signed] _____
AURELIA PUCINSKI,
Clerk of the Circuit Court

AURELIA PUCINSKI, CLERK OF THE CIRCUIT
COURT OF COOK COUNTY, ILLINOIS

APPENDIX N

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

U.S. Const., amend. XIV, Section 1:

> ". . . nor shall any State deprive any person of . . . liberty, . . . without due process of law . . . ."

APPENDIX O

RAISING THE FEDERAL QUESTION

A. In the court of first instance the federal question sought to be reviewed was raised at paragraph 3 of defendant's petition for judgment of acquittal or new trial based on newly discovered evidence and actual innocence, and throughout, passim. Paragraph 3 of defendant's petition for judgment of acquittal based on newly-discovered evidence and actual innocence: "Defendant petitions for judgment of acquittal or a new trial, also, pursuant to the substantive and procedural due process provisions of the Illinois and U.S. Constitutions. (citations omitted.)"

B. In the Illinois Appellate Court, First Judicial District, the federal question sought to be reviewed was raised at page 3 of Appellant's Brief, and throughout, passim. At page 3 of Appellant's Brief, defendant specified defendant petitioned below for judgment of acquittal or new trial based on newly-discovered evidence and actual innocence, based on Illinois statutory provisions, "and substantive and procedural due process provisions of the Illinois and U.S. Constitutions."

C. In the Illinois Supreme Court, the federal question sought to be reviewed was raised, throughout, passim, and at page 5 of defendant's petition for leave to appeal, with defendant "wondering how his actual innocence is somehow less significant than the actual innocence of the many other wrongfully convicted Illinois prisoners released after hearings on their claims?" Throughout, passim, and at page 5 of defendant's petition for leave to appeal, defendant is "wondering how his actual innocence is somehow less significant than the actual innocence of the many other wrongfully convicted Illinois prisoners released after hearings on their claims?"